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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

**STATE OF CALIFORNIA BY AND THROUGH  
 ATTORNEY GENERAL XAVIER BECERRA AND  
 CALIFORNIA STATE WATER RESOURCES  
 CONTROL BOARD, STATE OF NEW YORK,  
 STATE OF CONNECTICUT, STATE OF ILLINOIS,  
 STATE OF MAINE, STATE OF MARYLAND,  
 STATE OF MICHIGAN, STATE OF NEW JERSEY,  
 STATE OF NEW MEXICO, STATE OF NORTH  
 CAROLINA EX RE. ATTORNEY GENERAL  
 JOSHUA H. STEIN, STATE OF OREGON, STATE  
 OF RHODE ISLAND, STATE OF VERMONT,  
 STATE OF WASHINGTON, STATE OF  
 WISCONSIN, COMMONWEALTHS OF  
 MASSACHUSETTS AND VIRGINIA, THE NORTH  
 CAROLINA DEPARTMENT OF  
 ENVIRONMENTAL QUALITY, THE DISTRICT OF  
 COLUMBIA, AND THE CITY OF NEW YORK,**

Plaintiffs,

v.

**ANDREW R. WHEELER, AS ADMINISTRATOR  
 OF THE UNITED STATES ENVIRONMENTAL  
 PROTECTION AGENCY; UNITED STATES  
 ENVIRONMENTAL PROTECTION AGENCY; R.  
 D. JAMES, AS ASSISTANT SECRETARY OF THE  
 ARMY FOR CIVIL WORKS; AND UNITED  
 STATES ARMY CORPS OF ENGINEERS,**

Defendants.

Case No. 3:20-cv-03005-DMR

**DECLARATION OF REBECCA ROOSE**

Date:  
 Time:  
 Courtroom:  
 Judge:  
 Trial Date:  
 Action Filed:

**DECLARATION OF REBECCA ROOSE****I, Rebecca Roose, state and declare as follows:**

1. My name is Rebecca Roose. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I submit this declaration in support of the motion by the States and Cities for a preliminary injunction. As discussed below, the WOTUS Rule will have a devastating impact on New Mexico's waters and the State is in no position to fill the regulatory vacuum left by EPA and the Army Corps as a result of that rule.

**BACKGROUND**

3. I am employed as the Director of the Water Protection Division of the New Mexico Environment Department (Department). In my role, I oversee the Department's Ground Water Quality, Surface Water Quality, Drinking Water, and Construction Programs Bureaus. I have been employed by the Department for approximately one year. Prior to joining the Department, I worked for the U.S. Environmental Protection Agency (EPA). At EPA Headquarters, I devoted 13 years to supporting EPA, states, and tribes with implementation of Clean Water Act (CWA) programs. Specifically, I drafted and defended National Pollutant Discharge Elimination System (NPDES) program regulations and effluent limitations guidelines promulgated pursuant to CWA Section 402, provided oversight of states' implementation of NPDES, pretreatment and CWA Section 319 nonpoint source control programs, and developed policy and training for compliance inspections of NPDES permittees and CWA Section 311 spill prevention, control and countermeasures facilities. During my tenure at EPA, I served as a national expert on NPDES requirements for Concentrated Animal Feeding Operations, NPDES program requirements for authorized states and tribes, and NPDES compliance monitoring policy. I earned my law degree and natural resources law certificate from the University of New Mexico in 2004.

4. The purpose of the Department is "to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by

1 the environment; and will maximize the economic and cultural benefits of a healthy people.”  
 2 N.M. STAT. ANN. § 74-1-2 (1997).

3 5. The Department serves as agent of the State in matters of environmental management and  
 4 consumer protection. N.M. STAT. ANN. § 74-1-6(E) (2009). The Department has primary  
 5 responsibility for implementing the activities of the New Mexico Water Quality Control  
 6 Commission, the state water pollution control agency for purposes of the federal CWA.

### 7 **THE WOTUS RULE’S HARM TO NEW MEXICO WATERS**

8 6. New Mexico has seven traditionally navigable waters (TNWs): the Rio Grande, the  
 9 Canadian River, the San Juan River, the Cimarron River, the Rio Chama, the Pecos River, and  
 10 Navajo Lake. The U.S. Army Corps of Engineers (USACE) has attempted to designate the entire  
 11 stretch of the Gila River that flows through New Mexico as a TNW, but this designation has been  
 12 challenged and to date remains unresolved. In its review of the National Hydrology Dataset, the  
 13 Department has determined that approximately 89% of the State's rivers and streams are  
 14 ephemeral, 7% are perennial, and 4% are intermittent. Under the WOTUS Rule, none of the  
 15 ephemeral streams will be protected by the CWA.

16 7. The WOTUS Rule will also result in the loss of many wetlands in New Mexico. Saint  
 17 Mary’s University of Minnesota's Geospatial Services, with input from the Department, created a  
 18 model to evaluate the extent of federally protected wetlands and other surface waters in the  
 19 Cimarron River Watershed.<sup>1</sup> The results of this case study show that by narrowing the scope of  
 20 federal jurisdiction, the number of wetlands protected by the CWA is substantially decreased,  
 21 leading to a likely loss of benefits provided by wetlands such as flood control and attenuation,  
 22 pollution control, wildlife habitat, and recreation. Depending on how the new WOTUS rule is  
 23 applied, 20-70% of the wetlands in the Cimarron River Watershed would lose CWA protections.

24 8. To represent benefit-cost analyses of the WOTUS Rule, EPA and USACE (collectively  
 25 the “Agencies”) relied on three case studies in the supporting Economic Analysis, “to explore  
 26

27 <sup>1</sup> For details of the Saint Mary’s University of Minnesota model, visit  
 28 <https://www.arcgis.com/apps/Cascade/index.html?appid=f3de6b30c0454c15ac9d3d881f18ae33>.

(continued...)

potential changes and resulting forgone benefits and avoided costs.”<sup>2</sup> The case studies focused on three geographical regions – the Ohio River Basin, the Lower Missouri River Basin, and the Rio Grande River Basin – that intersect 10 states. The Rio Grande River Basin was divided into two major watersheds, the Upper Pecos (HUC 1306) and Lower Pecos (HUC 1307) River Basins, which contain a combined 44,300 square miles in New Mexico and Texas from east of Santa Fe, New Mexico to the confluence of the Pecos River and Rio Grande at the Texas-Mexico border. This case study found 85% of stream miles within the Upper Pecos River Basin in New Mexico are ephemeral, and 34% of all wetland acres to be “non-abutting” wetlands. These ephemeral waters and non-abutting wetlands in the Upper Pecos River Basin will no longer be protected under the WOTUS Rule. Further, the cost analysis for the Pecos River case study shows benefits of the WOTUS Rule to be minimal or negligible; however, the Agencies did not quantify or monetize the environmental effects and forgone benefits of the WOTUS Rule for the Rio Grande River Basin case study, blaming this deficiency on limitations in the data. The *Economic Analysis of the EPA-Army Clean Water Rule*<sup>3</sup> monetized the ecosystem services and benefits from wetlands, so it is possible to evaluate this important component of any new rule. In fact, the estimation of nonmarket environmental values is not new – one notable example is compensation for the 1989 Exxon Valdez oil spill in the Gulf of Alaska. It is well known that wetlands provide many ecological and economic benefits to watersheds such as filtering and improving water quality, flood attenuation, erosion control, carbon sequestration, aquifer recharge, and providing fish and wildlife habitat and nurseries.<sup>4</sup> It is also known that ephemeral waters are ecologically and hydrologically significant in arid and semi-arid watersheds of the southwestern United States.<sup>5</sup> Loss of environmental protections for ephemeral streams and wetlands, reductions in

<sup>2</sup> Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S. Environmental Protection Agency and U.S. Department of the Army. January 22, 2020.

<sup>3</sup> Economic Analysis of the EPA-Army Clean Water Rule. U.S. Environmental Protection Agency and U.S. Department of the Army. May 20, 2015. Available at: [https://www.epa.gov/sites/production/files/2015-06/documents/508-final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-20-15.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf)

<sup>4</sup> <https://www.epa.gov/sites/production/files/2016-02/documents/wetlandfunctionsvalues.pdf>

<sup>5</sup> Levick, L., et al. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

1 water quality, and cumulative impacts will be devastating to wildlife and humans who are  
2 dependent on these waters, especially at the local scale, and should have been quantified.

3 9. Because of the ephemeral exemption and new definition of “adjacent wetland,” the  
4 WOTUS Rule will create a significant gap in regulation under CWA Section 402 general permits  
5 (i.e., construction and industrial stormwater discharges) and CWA Section 404 dredge and fill  
6 permits in ephemeral streams and non-abutting wetlands. The Agencies considered the potential  
7 effect of the WOTUS Rule on issuance of CWA Section 402 permits for stormwater from  
8 construction activities. Overall, the Agencies concluded that the ephemeral exemption would  
9 likely change circumstances in arid and semi-arid states where many streams are ephemeral, and  
10 CWA protections would be removed from the vast majority of waters in these states.<sup>6</sup> As a result,  
11 many construction sites in arid states will not be required to obtain NPDES permit coverage for  
12 stormwater discharges. Dredge and fill and industrial activities in ephemeral streams will not  
13 need a CWA Section 404 permit. Besides excess sediment, which can smother bottom-dwelling  
14 organisms, fill deep pools that are critical refugia during summer and drought, and clog or injure  
15 gills of fish, stormwater carries other harmful pollutants. Construction, industrial, and urban sites  
16 generate pollutants such as phosphorus and nitrogen from the application of fertilizer, various  
17 metals (arsenic, cadmium, chromium, copper, zinc), acidic wastewaters, pesticides, phenols,  
18 paints, solvents, phthalates, petroleum products, and solid wastes that attach to sediment and/or  
19 get washed into streams and wetlands during overland stormflows. Sediment loading rates from  
20 constructions sites are typically 10 to 20 times that of agricultural lands and 1000 to 2000 times  
21 that of forest lands. Even a small amount of construction or industrial activity may have a  
22 significant negative impact on water quality in localized areas if permits are not required and  
23 proper management practices are not implemented to reduce or eliminate pollutants in  
24 stormwater. New Mexico has over a thousand facilities covered by stormwater general permits  
25 and approximately 25-45% of these will no longer be subject to those stormwater management  
26 requirements as a result of the WOTUS Rule.

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28 <sup>6</sup> Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States.” U.S.  
Environmental Protection Agency and Department of the Army. January 22, 2020.

1        10. The WOTUS Rule will also create a significant gap in regulation of individual permits  
2 issued by EPA under CWA Section 402 in New Mexico. The Agencies did not effectively  
3 consider the potential effect of the WOTUS Rule on issuance of CWA Section 402 individual  
4 permits for discharges to ephemeral or other non-jurisdictional waters under the WOTUS Rule.  
5 New Mexico currently has 115 individual, EPA-issued NPDES permits in the State, including  
6 permits issued in Indian Country. Under the 2020 Rule, approximately 50% of these current  
7 permittees will no longer be required to obtain an NPDES permit because they discharge to  
8 receiving streams that lose CWA protections. Examples of facilities in New Mexico that would  
9 no longer discharge pursuant to NPDES individual permit requirements include: municipal and  
10 private domestic wastewater treatment plants; tribal and Bureau of Indian Affairs wastewater  
11 treatment plants; multiple types of mines, both active and in reclamation (coal, uranium, cement,  
12 rock, minerals and metals); national laboratories; federal facilities; fish hatcheries; and oilfield  
13 sanitary waste treatment plants. Eliminating CWA protections will degrade ephemeral water  
14 quality and the downstream TNWs and other jurisdictional waters that they feed.

15        11. The Department has relied upon the Agencies' broad interpretation of WOTUS under the  
16 1980s regulations and the *Rapanos* Guidance in order to ensure protection of New Mexico's  
17 waters.

18        12. The WOTUS Rule's ephemeral exemption will have a disproportionate effect on water  
19 quality in the arid Southwest (e.g., Arizona, Nevada, and New Mexico) because many stormwater  
20 discharges from sites into ephemeral streams will no longer be subject to CWA permits. New  
21 Mexico is one of the driest states, averaging less than twenty inches of annual precipitation.  
22 Ephemeral streams provide the same ecological and hydrological benefits as perennial streams by  
23 moving water, sediment and nutrients through the system to be utilized downstream. Ephemeral  
24 flows are in need of CWA protection because when they are functioning properly they provide  
25 important hydrologic connections across the landscape and across geopolitical boundaries; they  
26 dissipate stream energy during high flow events to reduce erosion, thus improving water quality;  
27 they recharge aquifers where water can be stored for current and future drinking water supplies;  
28 they transport, store and deposit sediment to help maintain floodplains; they transport, store and

1 cycle nutrients for vegetation, wildlife and aquatic life; and they support and provide migration  
2 corridors. Given the distribution of ephemeral streams in New Mexico (89% of streams) and their  
3 important hydrological and ecological functions, cumulative impacts of ephemeral streams  
4 throughout a watershed must be considered in order to protect and maintain water quality and  
5 watershed health. Removing protections from ephemeral streams will degrade water quality in the  
6 jurisdictional waters that they feed.

7 13. Science has clearly demonstrated that ephemeral waters are ecologically and  
8 hydrologically significant in the arid southwestern United States. In New Mexico, ephemeral  
9 tributaries contribute up to 76% of the stormflow in the Rio Grande after a storm event. Where  
10 pollutants can be mobilized, ephemeral stormflows will deliver the pollutants to downstream  
11 waters, such as the Rio Grande – a TNW. The cumulative impacts of these non-jurisdictional  
12 ephemeral stormflows are detrimental to downstream water quality and threaten human health  
13 and the environment.

14 14. More frequent droughts and shifting precipitation patterns due to climate change result in  
15 lower water levels in rivers, lakes, and streams, leaving less water to dilute pollutants. In addition,  
16 more frequent and more powerful storms increase polluted runoff from urban and agricultural  
17 areas, which transports pollutants from the landscape to nearby waterways. These changes will  
18 stress aquatic ecosystems and dramatically impact communities throughout the United States,  
19 especially in the Southwest. Community impacts include threats to public health, economic strain,  
20 and decreased quality of life. The effects of climate change in New Mexico amplify the  
21 complexities of western water management. A lack of connectivity or perenniality today or in a  
22 “typical year” is not a suitable feature that EPA, USACE and New Mexico can rely upon to  
23 define a jurisdictional water.

24 15. Tijeras Arroyo presents an example of the anticipated devastating effects of the WOTUS  
25 Rule on water quality. This waterway winds for 26 miles from its headwaters in the Sandia and  
26 Manzano Mountains east of Albuquerque, New Mexico through developed and undeveloped  
27 areas of Albuquerque in the foothills, including Kirtland Air Force Base, before entering the Rio  
28 Grande. The waterway is perennial in the headwaters but is ephemeral for 11 miles as it flows out



1 of the mountains and into the Rio Grande. Tijeras Arroyo is a major tributary of the Rio Grande  
2 in the Albuquerque area and carries stormwater, and any pollutants mobilized by stormwater, to  
3 the Rio Grande during significant rain events. It is the subject of (1) a Watershed Restoration  
4 Action Strategy to address excess *E. coli* bacteria and sedimentation through stormwater  
5 management and erosion controls; (2) a Total Maximum Daily Load (TMDL) to reduce  
6 watershed nutrient loading during both low-flow and high-flow events; and (3) federal permits  
7 including several CWA Section 404 permits, an individual NPDES permit for Kirtland Air Force  
8 Base, and the Municipal Separate Storm Sewer System (MS4) permit for the Albuquerque-  
9 Bernalillo County area under CWA Section 402. These various permits and requirements limit  
10 and/or monitor the discharge of the following pollutants into Tijeras Arroyo: nitrate-nitrogen,  
11 ammonia-nitrogen, total nitrogen, total phosphorus, ethylene dibromide (EDB), heptachlor, per-  
12 and polyfluoroalkyl substances (PFAS), total residual chlorine, total suspended solids, biological  
13 oxygen demand, and oil and grease. In addition, the Rio Grande downstream of Tijeras Arroyo is  
14 impaired for *E. coli* bacteria, polychlorinated biphenyls (PCBs) in fish tissue, and dissolved  
15 oxygen. Tijeras Arroyo was jurisdictional under the 1980s regulations, the 2008 Rapanos  
16 Guidance, and the 2019 Rule but is not jurisdictional under the 2020 WOTUS Rule. Surface  
17 water quality is also a major concern for the two acequia associations in the Tijeras watershed and  
18 the Pueblo of Isleta, which is downstream of Tijeras Arroyo and the City of Albuquerque. Under  
19 the WOTUS Rule, these CWA protections (e.g., *E. coli* strategy, TMDL, NPDES permits) will  
20 not be enforceable as is. They will either be modified to move the point of discharge to a  
21 jurisdictional water and consequently dilute the limitations and requirements, or they will be  
22 terminated.

23 16. Another example of the WOTUS Rule's harm is the Gila River, which originates in the  
24 Nation's first designated wilderness area (the Gila National Wilderness) and is the last major wild  
25 and free-flowing river in New Mexico. The Gila River supports a remarkable abundance of  
26 aquatic life and wildlife, provides significant economic value to the region through abundant  
27 outdoor recreation opportunities, and is culturally important to indigenous peoples who have lived  
28 in southwestern New Mexico for thousands of years. The Gila River flows from New Mexico into



1 Arizona and typically goes dry before it reaches the Colorado River due to large irrigation  
2 diversions, groundwater mining, and sustained drought. Some segments of the Gila River in  
3 Arizona have been designated as TNWs, but the Gila River is not a designated TNW in New  
4 Mexico. New Mexico's Gila River was named by American Rivers as the country's most  
5 endangered river in 2019 because of threats from water diversions and climate change.<sup>7</sup> If the  
6 new WOTUS Rule is implemented, the Gila River in New Mexico would not be protected by the  
7 CWA, further endangering this precious resource.

8 17. The Rio Hondo Watershed in south-central New Mexico is yet another example of the  
9 irreparable harm the WOTUS Rule will have on New Mexico. As the perennial headwaters of the  
10 Rio Ruidoso and Rio Bonito flow downstream, they become interrupted and eventually go  
11 underground along several ephemeral segments. Because the ephemeral segments are  
12 substantially long (over 50 miles), it is highly unlikely that the Rio Ruidoso, Rio Bonito or  
13 upstream portions of the Rio Hondo have a surface connection to the Pecos River (a TNW) in a  
14 "typical year." Therefore, everything upstream of these ephemeral breaks/segments would be  
15 considered non-jurisdictional under the WOTUS Rule. In this watershed there are several  
16 facilities that would no longer be required to obtain a NPDES permit to discharge to the river,  
17 including the Ruidoso Downs Wastewater Treatment Plant and the Ruidoso Racetrack. The Rio  
18 Ruidoso already exceeds water quality standards for total nitrogen and total phosphorus, two  
19 pollutants that are controlled by the aforementioned NPDES permits. Historically, excess nitrogen  
20 and phosphorus have negatively impacted downstream irrigation uses. Further, construction and  
21 industrial sites would not be required to obtain NPDES permit coverage for their stormwater  
22 discharges. This means industrial facilities and construction sites could discharge pollutants into  
23 the river without consequence under federal law. Loss of federal pollution control for the Rio  
24 Ruidoso could result in polluted water conveyed to local farms via the 82 acequias, or community  
25 ditches, in this area. Acequias have important historical and cultural value in New Mexico, with  
26 many dating to the 17<sup>th</sup> and 18<sup>th</sup> Centuries, and provide essential water for agriculture. Public

27 \_\_\_\_\_  
28 <sup>7</sup> <https://www.americanrivers.org/2019/04/americas-most-endangered-rivers-of-2019-spotlights-climate-change-threats/>

1 health and the environment will be directly impacted by the federal rollback and unregulated  
2 pollutant discharges in the Rio Hondo Watershed.

3 18. Because the vast majority of New Mexico's waters are ephemeral and large numbers of  
4 wetlands will lose protections, the WOTUS Rule will have a profound adverse effect on water  
5 quality in the state. In much of the country, ephemerality of rivers is typically seen in the upper  
6 watershed where impacts of the proposed rule may be minimal. That is not the case in the arid  
7 West. By removing protections for ephemeral waters, waters like the Santa Fe River, Rio  
8 Ruidoso, Jemez River, Rio Puerco, Tijeras Arroyo, and Rio Grande tributaries on the Pajarito  
9 Plateau (which contain legacy contamination from the Manhattan Project) will have severed and  
10 interrupted jurisdiction in the middle and lower reaches. This will create a patchwork of  
11 jurisdictional and non-jurisdictional segments along the path of a river that will make it nearly  
12 impossible to implement an effective water quality protection program. A patchwork of  
13 unregulated contamination will have serious public health and economic consequences related to  
14 drinking water supplies, cultural and agricultural uses, recreational uses, and aquatic species and  
15 wildlife.

16 **DIFFICULTIES OF FILLING THE FEDERAL REGULATORY GAP WITH STATE**  
17 **PROGRAMS**

18 19. New Mexico cannot, as a practical matter, fill the regulatory gap created by the WOTUS  
19 Rule. The WOTUS Rule disproportionately impacts states that do not have authority to operate  
20 the NPDES permitting program under CWA Section 402. This program is the primary  
21 mechanism under the Act for regulating and limiting discharges of pollutants into the "waters of  
22 the United States." Further, the WOTUS Rule disproportionately impacts arid states that have  
23 many ephemeral waters. The State of New Mexico fits both these characterizations and is  
24 therefore particularly adversely impacted by the WOTUS Rule.

25 20. The Agencies state, "[a]bsent CWA jurisdiction, states and tribes can still choose to  
26 regulate waters irrespective of federal mandates." While in theory this may be true, in practice  
27 this is impossible for states without NPDES authority or an established state permitting program.  
28 New Mexico is one of only three states without NPDES authority, and the only such state in the

1 west. While the Department is interested in having EPA authorize New Mexico to implement the  
2 NPDES program, adopting and implementing such a program requires significant time, funding,  
3 and staff. Unlike most states with established NPDES programs, New Mexico does not have the  
4 legal and procedural program infrastructure to issue NPDES-like permits to regulate discharges of  
5 pollutants to surface waters of the state that are not WOTUS under the new definition. As laid out  
6 above, the Department estimates that 50% of NPDES individual permits and 25-45% of  
7 stormwater general permits will not be required under the 2020 Rule amounting to hundreds of  
8 unregulated discharges in New Mexico as a result of the federal rollback, creating a burdensome  
9 federal regulatory gap that the state is expected to fill to protect its surface waters and its citizens.

10 21. The WOTUS Rule imposes significant resource burdens on the Department while putting  
11 the health of New Mexico waters at great risk. The premise that all states are capable of  
12 addressing water quality issues in their state is false. Not all states can implement a robust and  
13 successful water quality program without significant federal assistance. Recurring federal and  
14 state funds need to be identified to support a New Mexico surface water discharge permitting  
15 program because reasonable permit fees would not cover the costs of the program in New  
16 Mexico. Federal financial support for pollution control programs has been steadily declining over  
17 the past decade to the detriment of New Mexico's precious surface waters.

18 22. To prevent water quality degradation in State surface waters from the rollback of CWA  
19 protections, the Department will be required to expand the Surface Water Quality Bureau and  
20 develop a State surface water permitting program. The Department lacks sufficient funding to  
21 expand the Bureau and implement a permitting program as the WOTUS Rule goes into effect. In  
22 addition, expansion and funding requests are dependent on approval from the State legislature.  
23 With no new funding associated with this substantial shift in CWA jurisdiction, oversight of  
24 WOTUS Rule implementation will force the Department to pull resources from current Surface  
25 Water Quality Bureau priorities, such as ambient water quality monitoring, assessment and  
26 reporting on the status of the state's surface waters, water quality standards revisions, water  
27 quality management and watershed-based planning, watershed and wetland restoration, and  
28 program and project effectiveness monitoring. In fulfilling its mission to preserve, protect and

1 improve surface water quality across our state, the Department will be harmed by the WOTUS  
2 Rule due to the need to redirect already strained resources, inadequate resources to implement an  
3 effective permitting program, and uncertain legislative and federal support.

4 23. The WOTUS Rule introduces great uncertainty into the Department's regulatory efforts  
5 and burdens the Department with the onerous task of interpreting and applying the Rule. If the  
6 WOTUS Rule becomes effective, previous guidance documents, memoranda, and materials will  
7 be rendered inoperative. In addition, the Department is unaware of a firm commitment by the  
8 Agencies to provide guidance and training to assist with early implementation of the WOTUS  
9 Rule. This would hamper and delay the Department's ability to administer Surface Water Quality  
10 Bureau programs affected by the new WOTUS definition when questions arise. For example, on-  
11 the-ground investigations will be needed to delineate which waters are truly intermittent and  
12 which are ephemeral for compliance and enforcement purposes. Considering New Mexico has  
13 over 88,000 miles of non-perennial streams, and the vast majority of streams in the State do not  
14 have active gages to measure stream flows, these stream-specific investigations will be extremely  
15 resource-intensive. The Department already has received inquiries from various stakeholders  
16 about scope and implementation of the WOTUS Rule that cannot be answered due to  
17 uncertainties related to jurisdictional interpretation and enforcement. These are not insignificant  
18 burdens and may lead to additional costly litigation stemming from the Department's future  
19 interpretation the new WOTUS definition

20 **THE WOTUS RULE WILL ADVERSELY AFFECT THE NEW MEXICO ECONOMY**

21 24. The value of healthy surface waters in New Mexico is both cultural and economic. New  
22 Mexico's diverse waters recharge aquifers, provide important ecological and hydrological  
23 connections, support an amazing variety of wildlife and aquatic life, maintain drinking water  
24 resources, and sustain critical economic activity. The State's lakes, reservoirs, rivers, streams, and  
25 wetlands are essential to the future vitality of the agricultural, outdoor recreation and tourism  
26 industries.

27 25. The WOTUS Rule does not take into account the recreational economy impacts  
28 associated with poorer water quality influencing lake and river recreation as well as the many

1 rafting companies in New Mexico that depend on clean water for their business. Sixty-five  
2 percent of New Mexicans participate in outdoor recreation activities each year. The New Mexico  
3 Tourism Department reports that the State also has a high percentage of visitors who choose  
4 outdoor recreation activities, such as river rafting, fly fishing, camping, boating and wildlife  
5 viewing along the state's scenic waters. Visitors spent \$846 million on recreation in the state in  
6 2017 and spending supports 13,000 direct jobs. In addition, the New Mexico Department of  
7 Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending \$268 million  
8 on their activities annually. In recognition of the state's iconic natural landscapes and treasured  
9 waters, desire to protect and conserve New Mexico's lands and waters, and potential for  
10 developing a more robust outdoor recreation-based economy, the New Mexico Outdoor  
11 Recreation Division was created by legislation during the 2019 legislative session. This Division  
12 is tasked with increasing outdoor recreation-based economic development, tourism and  
13 ecotourism, recruiting new outdoor recreation business to New Mexico, and promoting education  
14 about outdoor recreation's benefits to enhance public health. Investing in outdoor recreation helps  
15 promote healthy lifestyles and a high quality of life and attracts and sustains employers and  
16 families. People do not want to recreate on polluted waters that cannot sustain healthy fish, bird  
17 and wildlife populations. The outdoor recreation industry in New Mexico will be adversely  
18 impacted by the gap in coverage when the WOTUS Rule goes into effect, to the detriment of jobs  
19 and revenue in New Mexico.

20 26. The WOTUS Rule will also create economic burdens associated with new regulatory  
21 gaps. Approximately 40% of New Mexicans rely on surface water as a drinking water source. The  
22 regulatory gaps created by the ephemeral waters exemption and loss of wetlands protections  
23 resulting from the WOTUS Rule will result in decreased water quality, as explained above. As a  
24 result, the cost to treat drinking water and maintain drinking water infrastructure will increase.  
25 The cost to treat surface water to drinking water standards depends on the quality of water  
26 coming into the treatment plant, the technologies used, the size of the system, and the energy  
27 source. Municipalities will likely need to invest in water treatment infrastructure and other costly  
28 technologies, such as desalination and ultrafiltration, to provide clean, safe water for drinking.

1 Degraded water quality coming into the treatment plant, the need for improved and more costly  
2 treatment technologies and the less populated, rural nature of New Mexico as a whole will cause  
3 water treatment costs to increase substantially for many in the state and may force municipalities  
4 to choose lower water quality over necessary investments for clean and safe drinking water. In  
5 addition, enhanced treatment to remove pollutants causes increased water loss during treatment,  
6 which translates to less potable water in an increasingly arid State.

7 27. The Agencies failed to address cross-media implications of the WOTUS Rule. The  
8 federal Resource Conservation and Recovery Act (RCRA) exempts wastewater treatment units  
9 from regulation under RCRA if, in addition to a number of other conditions, those units discharge  
10 effluent pursuant to a NPDES permit. 42 U.S.C. § 6903(27). Under the WOTUS Rule, many  
11 facilities currently discharging pursuant to a NPDES permit would no longer be required to have  
12 such a permit due to the jurisdictional change in the waters to which they discharge. As a result,  
13 these facilities may be subject to regulation under RCRA for the first time, are likely to not have  
14 performed an analysis of whether they are subject to RCRA, and would likely not be in  
15 compliance with RCRA as a result. Given that a number of these facilities are industrial or  
16 municipal facilities that have not contemplated regulation as a RCRA treatment, storage or  
17 disposal facility (TSDF), this will present an additional economic hardship on these facilities in  
18 New Mexico. If the industrial or municipal facilities are discharging into an ephemeral stream in  
19 New Mexico and that ephemeral stream is no longer a WOTUS, these newly regulated TSDFs  
20 may also be deemed as land disposing of waste – or hazardous waste – pursuant to the  
21 implications of WOTUS.

## 22 CONCLUSION

23 28. The Department respectfully requests that the Court enjoin implementation of the  
24 WOTUS Rule. If the rule takes effect, it will have a devastating impact on New Mexico's waters  
25 and harm the New Mexico economy. The rule creates a regulatory vacuum that the State will be  
26 incapable of filling to mitigate its harm.

27 29. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is  
28 true and correct.

1 Executed on the 11th day of May 2020 in Santa Fe, New Mexico.

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